



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 98 OF 2017

WYCLIFFE MUTALI OKWARO:.....PLAINTIFF

VERSUS

KENYA WOMEN MICRO FINANCE BANK LTD:.....1ST DEFENDANT

CHRISTINE WANJA GITONGA:.....2ND DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of an application dated 9th March 2017 brought by way of Notice of Motion by the plaintiff/applicant seeking for orders that :-

- 1) Spent
- 2) Pending the hearing and determination of this application inter partes this Honourable court be and is hereby pleased to grant an order of temporary injunction restraining the 1st Defendant, its agents, servants, employees from offering for sale, trespassing onto, transferring or in any other way interfering or dealing with land parcel **No. ELDORET MUNICIPALITY / BLOCK 21 (KINGONGO) / 3854.**
- 3) An order compelling the 1st Defendant to provide the plaintiff with the 2nd defendant's loan statements.
- 4) This Honourable court be pleased to grant an order of temporary injunction restraining the 1st defendant, its agents, servants, employees from offering for sale, trespassing onto, transferring or in any other way interfering or dealing with land parcel No. **ELDORET MUNICIPALITY BLOCK 21 (KINGONGO) /3854** pending the hearing and determination of the substantive suit herein.

This matter was brought to court by way of a certificate of urgency on 9th March 2017 when the court ordered that the application be served upon the respondents for inter parte hearing within 7 days. The same was served and interim orders granted on 21st March 2017. Parties went through the motions of filing replying affidavits and further affidavits with the leave of the court. Counsel later agreed to canvass the application vide written submissions which they did by 17th October 2017 and a ruling date given.

PLAINTIFF / APPLICANT'S SUBMISSIONS.

Counsel for the plaintiff /Applicant relied on the grounds on the face of the application, the Supporting Affidavit, further affidavits and the annexures. Counsel also relied on the cases cited in the Further Supporting Affidavit dated 11 /4/17 and the pleadings on record.

Mr Okara submitted that the plaintiff had established a prima facie case as per the conditions set out for grant of injunctions in the case of ***Giella vs Cassman and Co.Ltd [1973] EA 358***. Counsel relied on several authorities which he cited in the further affidavit sworn by the applicant.

It was the plaintiff's case that he is the sole registered owner of all that parcel of land known as **ELDORET MUNICIPALITY BLOCK 21 (KINGONGO) /3854**. which he guaranteed the 2nd defendant who was offered a financial facility by the 1st defendant herein. That the 1st defendant disbursed to the 2nd defendant Kshs. 1.4Million of which she had assured the 1st defendant that she was repaying only to receive a Statutory Notice dated 1/11/17 demanding the payment of Kshs. 576,496.22. He stated that he further received another notice dated 2/2/17 demanding for payment of Kshs. 575,314.49 failure of which the 1st defendant would exercise its Statutory power of sale under section 90 (3) (e) of the land Act of 2012. The applicant stated that he was apprehensive that the 1st defendant may proceed and actualize the threats as per the letters. He prayed that he be provided with the loan statements so that accounts can be taken and establish whether the loan has been fully paid or not. The applicant also stated that the application has been brought in good faith and the same should be granted in the interest of justice.

1ST DEFENDANT'S COUNSEL'S WRITTEN SUBMISSIONS

Counsel for the 1st defendant in response to the application submitted that the question before this Honourable Court for determination is as to whether or not the Applicant is deserving of the relief of temporary injunction as was established by the East African Court of Appeal in ***Giella -vs- Cassman Brown. & Co Ltd (1973) EA3***. Counsel cited the principles as enunciated that, the applicant must establish a prima facie case with a probability of success, must demonstrate that they will suffer irreparable injury which would not be compensated by an award of damages and lastly if the court is in doubt then it will decide the application on a balance of convenience.

Counsel further submitted that the burden is upon the applicant to establish that he has a prima facie case, a genuine and arguable case. He stated that it is not in dispute that the Applicant is a guarantor to Christine Wanja Gitonga, the 2nd defendant herein for Kshs. 1.4M which was advanced on the 27th August, 2014 and that the repayments were at a monthly rate of Kshs. 54,200 by forty-eight (48) equal installments until the loan is paid in full. It is also on record that the 2nd defendant executed a spousal consent as required by law.

It was Counsel's submission that the 1st Respondent before exercising its statutory power of sale complied with the mandatory provisions of law by first issuing a statutory notice to the Applicant and 2nd respondent after default of repayment of the overdraft facility. He stated that all these notices were served upon the applicant and 2nd respondent vide registered post as hereunder particularized and acknowledged in his supporting affidavit filed in court:-

1. Notice dated 1st November, 2016 section 90 of the Land Act;
2. Notice dated 2nd February, 2017 section 96 (3) of the Land Act; and (see Annexure **BK7 a&b**)

It was counsel's submission that the notices so issued, informed the applicant on the nature and extent of default; what he must do to rectify the default and the consequences if the default was not rectified within the time specified in the notice as provided under the relevant provisions of the Land Act No.6 of 2012.

Counsel further submitted that the borrower the 2nd Respondent filed appearance but failed to file a replying affidavit as the account holder on the allegations on the application either in support of or against

and the replying affidavit leaving the issues raised uncontroverted. He stated that the 1st Respondent has complied fully with **prayer c** sought in the application before this court through annexure **BK6** and therefore the same is spent.

On the limb as to whether the applicant will suffer irreparable injury which would not be compensated by damages, counsel cited the case of **Kyangaro v Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126**. where **Njagi J** observed that “Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity.” He further cited the case of **Hilda Kagure -vs- Moses Leshao HCCC ELC (2012) e KLR** where the court noted that injunctions being a discretionary remedy a party **who has misconducted himself in a manner not acceptable to a Court of equity, will be denied the remedy.**

Counsel also stated that any extension or temporary injunctions while the applicant and the 2nd Respondent remains in persistent default shall be tantamount to re-writing of the contract between the parties as was held in **John Edward Ouko v National Industrial Credit Bank Ltd (2013) e KLR** Kasango J stated that-

The Plaintiff in bringing the motion before the court seems to seek this court to rewrite the contract between him and the Defendant, my response is to say that this is forbidden ground. The case law is clear on that. In the case of Kenya Breweries LTD -VS- Okeyo (2002) EA the Court of Appeal stated: -

It is trite law that a contracting party who fails to perform his part of the contract obtain an injunction to restrain a breach of covenant by the other party.

In the case of **Ecobank Kenya Limited & Anor vs Grace Wanjiru Gitonga, Nairobi Civil Appeal No. 39 of 2013**, Justice D. A. Onyancha in allowing the appeal by setting aside the orders of injunction of the lower court stated that it is now trite law that in cases where a chargor contracted to be advanced funds on agreed terms and conditions, in default of which the chargee’s right to realize its security would rarely demonstrate a prima facie case after breaking the terms and conditions in the mortgage contract.

Counsel further referred the Court to the case of **Maithya V. Housing Finance Co. of Kenya and Another** where Justice Nyamu noted: -

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or a credit facility...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized.”

Counsel therefore urged the court to dismiss the applicant’s application as he has not justifiably demonstrated to this Honourable Court that there is a prima facie case and that in case the said order sought is not granted, he stands to suffer irreparable harm which cannot be compensated by way of damages. He also urged the court to find that the balance of convenience tilts in favor of the 1st Respondent.

Analysis and determination

This is an application for grant of temporary injunction. The principles of grant of temporary injunction are well settled as per the Giella case. The court is guided by these principles and I need not reinvent the wheel. The plaintiff/applicant stated his case as per the supporting affidavit and further affidavits which have been highlighted above.

The applicant further elaborated his case by citing authorities in the affidavits. What is an affidavit and

what is it supposed to contain. An affidavit is statement of facts confirmed by oath or affirmation. Because the court relies on affidavits to make important decisions, there are strict rules about how they should be written, what they can include, and how they must be sworn or affirmed My question is whether citing authorities in an affidavit is proper. Are these authorities statement of facts within the knowledge of the deponent even if they hide behind the strength that they have been advised by their advocates. Methinks that these authorities should be cited in submissions if parties have agreed to file written submissions. If the parties are arguing orally then they should cite them when presenting their arguments and not in affidavits.

Going to the gist of the application, the issues that the court needs to determine are as to whether the Statutory notices were issued in accordance with the procedures and the law. It is not in dispute that the plaintiff/applicant guaranteed the 2nd defendant for a loan of Kshs. 1.4 Million as admitted by the applicant. It is also not in dispute that the 2nd defendant has defaulted in repayment of the instalments as stipulated in the charge document. The 2nd defendant also complied with the law by signing the spousal consent to enable the plaintiff guarantee the loan.

From the pleadings, the annexures and the submissions from both counsels I notice that the 2nd defendant who has defaulted and has been sued has not filed any response to the application and yet she has been adversely mentioned as a defaulter. At this interlocutory stage, it is also clear that the 1st defendant complied with the law when it issued the statutory notices upon default by the 2nd defendant. All the notices were addressed to both the plaintiff as a guarantor and the 2nd defendant as a defaulter. The plaintiff cannot be heard to say that he would want the court to compel the 1st defendant to supply him and the 2nd defendant with statements. This is not a ground for granting injunctions. Furthermore, the plaintiff and the 2nd defendant are at liberty to approach the 1st defendant to get the statements. It has not been stated that the 1st defendant has been unwilling to supply such statements. Infact the 1st defendant submitted that this angle of argument is spent as they have attached the statement as an annexure to the affidavit.

The plaintiff further averred that the property is matrimonial property. Warsame J(as he then was) in the case of **Maltex Commercial Supplies Limited & Another -vs- Euro Bank Limited (In Liquidation) HCCC Number 82 of 2006** held: -

“..Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured.”

The fact that a property is matrimonial property does not make it special in terms of realization as a security. Once it is offered as security it is treated as any other security and thus does not acquire a different characteristic known as matrimonial property. The applicant cannot evoke the empathy of the court with the character of matrimonial property. This line of argument is dead on arrival.

Further he who comes to equity must come with clean hands. In the case of **DANIEL KAMAU MUGAMBI v HOUSING FINANCE COMPANY OF KENYA LTD [2006] e KLR** quoted the case of **FRANCIS J. K. ICHATHA v HOUSING FINANCE CO. of KENYA LIMITED** (above-cited), wherein the learned judge said: -

“A plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the Defendant/Respondent a debt of which he expressly undertook to pay.”

I notice as earlier stated that the plaintiff is being economical with the truth in this matter. What is the relationship of the plaintiff with the 2nd defendant, is it of husband and wife? If so, why would you sue

your wife that she has refused to repay the loan. The plaintiff also averred that he has been assisting the 2nd defendant to repay the loan. If he has been assisting then he must be knowing how much they have paid and how far they have defaulted.

Applying the principles enunciated in the Giella case and upon considering the pleadings, annexures and the submission by both counsel, I find that the applicant has not established a prima facie case with a probability of success to warrant the grant of injunction.

I wish to rely on the authority of **J. M. Gichanga vs. Co-operative Bank of Kenya Ltd. (2005) eKLR** as per Maraga J.(as he then was) applying the finding in the Court of Appeal in **Aikman vs. Muchoki (1984) KLR 353** as follows:

“My understanding of the Court of Appeal decision in the Giella case is that the court proceeds to consider the second condition of irreparable harm which cannot be adequately compensated for an award for damages only if it entertains some doubt on the first condition of the probability of success, like when the court thinks that the plaintiff has a fifty/fifty chance of success. However, where, going by the material placed before it at an inter-parte hearing of an application for injunction, it appears to the court that the plaintiff has a strong case, like where it is clear that the defendant’s act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall into consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it”.

I subscribe to the above finding as it would not be necessary to consider the other limbs of the principles in the Giella case if the court is satisfied that the plaintiff has not established a prima facie case to warrant the grant of temporary injunction.

The upshot is that the plaintiff’s application dated 9th March 2017 lacks merit and is hereby dismissed with costs to the 1st defendant.

Parties to comply with order 11 within 30 days and set down the suit for hearing.

Dated and delivered at Eldoret on this 30th day of October, 2017.

M.A ODENY

JUDGE

Read in Open court in the presence of:

Mrs. Khayo holding brief for Okara for Plaintiff/Applicant

Mr. Miyenda holding brief for Miss Chesio for defendant/Respondent.

Mr. Koech: Court Assistant